

**THE HON T F BATHURST AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**‘DUTIES TO THE COURT, DUTIES OF THE COURT’**  
**LAW SOCIETY PLANNING CONFERENCE 2014**  
**BOWRAL, FRIDAY 14 NOVEMBER 2014\***

1. Good morning. Thank you for inviting me to speak at this year’s Planning Conference. It’s a pleasure to join you here in the picturesque Southern Highlands. Can I begin by acknowledging the traditional owners of the land on which we meet, and pay my respects to their elders past and present.
2. I’ve had a brief look at your Conference agenda and it certainly seems the year ahead will be a busy one for the Law Society. It’s pleasing to see the relationship that is being built with LAWASIA, which I’ve no doubt will be an important association for the profession. I’m very much looking forward to Sydney hosting the LAWASIA Conference of Chief Justices next year.
3. The letter inviting me to speak this morning suggested the topic, ‘Ethics of the Profession: a Judicial Perspective’. Without wanting to cause offence, it followed a well-trodden approach which judges seem to have embraced with enthusiasm in recent years – tack ‘a judicial perspective’ onto whatever subject you’ve been asked to discuss, and worry about what to talk about when the calendar alert appears on your computer a day or two before the event. It is, regrettably, a tactic that I have been guilty of from time to time.
4. However, the obvious problem is that this approach doesn’t really focus one’s thoughts or narrow in on what you would actually like me to talk about

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\* I express my thanks to my Research Director, Haydn Flack, for his assistance in the preparation of this address.

today. This is particularly the case in relation to professional responsibility and ethics which, as a result of rule 57, are matters that practitioners often discuss. This, I should say, is undoubtedly a good thing. However, it does make finding a topical issue on which to speak a little more challenging.

5. As professional ethics are increasingly made the subject of proscriptive rules, it is interesting (and also at times entertaining) to consider how these issues were addressed in the more distant past. There is a fascinating book which deals with legal ethics in the early 1900s written by Gleason Archer, the original founder of Suffolk University Law School in Massachusetts.<sup>1</sup> In the preface to *Ethical Obligations of the Lawyer*, Archer indicates there is a greater movement toward the codification of legal ethics by various bar associations across the US. However his book, he says, is meant to explain the principles which underlie the emerging rules of professional conduct.
6. Archer then goes on to consider a broad range of issues; many that we would recognise today as traditional matters of professional responsibility, and some that perhaps go far beyond a conventional understanding of legal ethics. For instance, Archer sternly warns his readers that the office should not be 'a lounging place for the attorney's idle friends and acquaintances.'<sup>2</sup> He is also a firm believer in a tidy workplace. In Archer's own words:

'A slovenly office conveys the impression that the occupant is slovenly in his work, and that a client would be taking chances of disaster in employing him.'<sup>3</sup>

On both of these counts I would have to respectfully disagree with Archer. There were plenty of barristers when I was at the bar who were extremely

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<sup>1</sup> G L Archer, *Ethical Obligations of the Lawyer* (Boston, Little Brown and Company, 1910).

<sup>2</sup> *Ibid* at 54.

<sup>3</sup> *Ibid* at 52-3.

busy despite their dishevelled chambers and acquaintances. I will avoid going into detail about the state of my office, or my friends for that matter.

7. Unfortunately, in what I'm sure will come as a great disappointment, the issues that I want to discuss with you this morning relate to one of Archer's more conventional snippets of wisdom. As he neatly put it, lawyers should 'consistently endeavour to economize [their]...time and that of the courts.'
8. I know that the overriding purpose of 'just, quick and cheap' in section 56 is a topic that is discussed to within an inch of its life. This will probably continue as we approach the 10 year anniversary of the *Civil Procedure Act*. However, there have been a number of interesting developments in the last year or so which give further guidance to practitioners in relation to the approach courts take when balancing efficiency with individual justice.
9. As a counterbalance – to try to make sure that I don't sound too much like I'm only delivering a lecture about the profession's responsibilities – I also want to say a few words about the task of courts in managing proceedings. As the High Court made clear in *Expense Reduction v Armstrong*, Part 6 of the *Civil Procedure Act* does not simply impose duties on the parties and their legal representatives; it also requires that the court use its broad powers to facilitate the overriding purpose.<sup>4</sup> It is important that any discussion of case management is not treated as a matter for practitioners alone. There are both duties to the court, as well as duties of the court.

#### **JUST, QUICK AND CHEAP: RECENT EXAMPLES**

10. I want to frame the issue of the overriding purpose around a significant judgment delivered by the Victorian Court of Appeal late last year. For those who are not familiar with the decision, *Yara Australia v Oswal*

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<sup>4</sup> *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303 at [56].

concerned an application for security for costs.<sup>5</sup> An Associate Judge had ordered that the respondents provide security; however that order was set aside by a single judge of the Court. The applicants sought leave to appeal.

11. Different applicants had sought security in various amounts against different combinations of the two respondents. However, in short, the amount of security sought totalled just over \$140,000. Leave to appeal was refused.<sup>6</sup>
12. At this stage things got a little more interesting. Immediately after publishing its reasons for refusing leave, the Court asked the parties to put on submissions addressing whether there had been a failure to comply with the overriding obligation under the Victorian *Civil Procedure Act* in the way in which the leave application was conducted. As you may know, the Victorian Act commenced at the beginning of 2011 following a significant Law Reform Commission report into civil justice. It has the purpose of, among other things, improving standards in the conduct of litigation and expanding the powers of courts in relation to costs in civil proceedings.<sup>7</sup> The Act has an overarching purpose which mirrors our section 56.<sup>8</sup> However it also sets out a series of specific obligations, including that reasonable endeavours must be used to ensure legal costs are reasonable and proportionate to the amount in dispute, as well as to the complexity of the issues in question.<sup>9</sup>
13. There were good reasons in *Yara* to query whether the application for security had been approached in a way that sought to facilitate the just, quick and cheap resolution of the proceedings. As I said, the amounts in issue came to a little over \$140,000. Despite this, the application for leave to appeal involved five silks, six junior counsel, five firms of solicitors and application books that were made up of six lever arch folders of material.

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<sup>5</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337.

<sup>6</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 156.

<sup>7</sup> *Civil Procedure Act 2010* (Vic) s 1(2).

<sup>8</sup> *Civil Procedure Act 2010* (Vic) s 7(1).

<sup>9</sup> *Civil Procedure Act 2010* (Vic) s 24.

14. In the end, the Court held that having regard to the fact the broader litigation was likely to be complex and expensive, the ‘unusual degree of legal representation’, to use their words, did not breach the obligation.<sup>10</sup> However, they found the Court and the respondents had been burdened with ‘repetitious and excessive’ material.<sup>11</sup> Ultimately, the solicitors for each applicant were ordered to indemnify their client for half of the respondent’s costs associated with the excessive application books, and they were prevented from recovering half of the costs of preparing the books. In what I can only assume would have led to some uncomfortable conversations, they were each also ordered to provide a copy of the decision to their client.
15. *Yara* offers the first detailed analysis of the overriding obligations under the Victorian Act. As a result, the Court addressed in some depth both the scheme setting out the obligations and the consequences that arise from a contravention. However, the following points are particularly noteworthy.
16. First, consistent with what I have said already, the Court emphasised that the Act creates dual responsibilities in relation to case management. It sets out a series of obligations which apply to any party, as well as to any legal practitioner, representative or practice which acts on behalf of a party.<sup>12</sup> However, the Act also imposes a corresponding obligation on the court to give effect to the overarching purpose when exercising its powers.<sup>13</sup> Second, practitioners – both solicitors and counsel – have individual responsibilities to comply with the overarching obligations. This applies to any practitioner involved in the preparation of materials or, as was relevant in *Yara*, in determining what is an appropriate level of legal representation.<sup>14</sup>

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<sup>10</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [39].

<sup>11</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [52].

<sup>12</sup> *Civil Procedure Act 2010* (Vic) s 10 referred to in *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [10].

<sup>13</sup> *Civil Procedure Act 2010* (Vic) s 8, which reflects the *Civil Procedure Act 2005* (NSW) s 56(2).

<sup>14</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [15].

17. Third, the powers given to the court where a contravention has occurred include the power to sanction a practitioner. This may have the effect of compensating another party in the proceedings. However, it can also serve a disciplinary or punitive function.<sup>15</sup> This, it was said, distinguishes the regime from others.<sup>16</sup> As the Court put it in *Yara*, the scheme provides

‘...a powerful mechanism to exert greater control over the conduct of parties and their legal representatives, and thus over the process of civil litigation and the use of its [being the court’s] own limited resources.’<sup>17</sup>

18. Finally, it was repeatedly emphasised that the court’s new powers had been under-utilised since their introduction. This may have been caused by an incorrect perception that the scheme did not significantly alter the previous rules or the court’s inherent jurisdiction.<sup>18</sup> However, the Court was keen to press the fact that judges should not shy away from initiating an inquiry simply because an application had not been made by one of the parties.<sup>19</sup>

19. It seems clear that the objective in *Yara* was to set a different tone regarding the new regime of overarching obligations. The decision was aimed not just at the parties to the proceedings, but also to other litigants and the judiciary. Unsurprisingly, *Yara* has been applied on numerous subsequent occasions. The Court of Appeal has repeatedly reiterated that the overarching purpose is not a ‘pious but toothless statement’ of principle that is meant to motivate parties and practitioners.<sup>20</sup> It is very much intended to have bite. *Yara*, I would suggest, is a decision aimed at establishing broader cultural change.

20. It is important to say something about our own State, so I will briefly mention only one Victorian decision post-*Yara*. *Eaton v ISS Catering* involved an

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<sup>15</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [20]-[21], [24].

<sup>16</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [17].

<sup>17</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [21].

<sup>18</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [23], [25].

<sup>19</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [27].

<sup>20</sup> *Setka v Abbott* [2013] VSCA 345 at [31].

appeal from a decision to refuse several adjournments in a ‘slip and fall’ personal injury claim.<sup>21</sup> In dismissing the appeal, the Court made an interesting observation about the importance of the overarching purpose in the context of the plaintiff not having complied with an order to serve its expert evidence. The Court noted that such directions obviously support the overarching purpose by ensuring the opposing party is given proper notice of the evidence to be relied on at trial. However, they are also an essential aspect in making sure that the parties are fully informed at mediation.<sup>22</sup> As the Court said, a perception should not be allowed to develop that practitioners operating on a ‘no win, no fee’ basis need not comply with directions, and can instead wait to see if the matter settles at mediation.<sup>23</sup>

21. However, coming back from that tangent, one observation made in *Yara* regarding the new regime in Victoria is that such powers do not exist in other jurisdictions. In fact, the Court went so far as to describe the relevant provisions in our *Civil Procedure Act* as ‘more aspirational than obligatory.’<sup>24</sup>
22. This, I would suggest, is incorrect. The Victorian courts have themselves acknowledged – including in *Yara* – that the various overriding obligations under the new regime have in fact always existed.<sup>25</sup> It is the case that the new Part 2.4 of the Victorian *Civil Procedure Act* provides extensive powers where there has been a contravention of one of the overarching obligations. The jurisdiction has been described as having both ‘compensatory and punitive elements’ and provides the court with a ‘panoply of powers’;<sup>26</sup> it also makes clear that such orders can be made on the court’s own motion.<sup>27</sup>

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<sup>21</sup> *Eaton v ISS Catering Services Pty Ltd* [2013] VSCA 361.

<sup>22</sup> *Eaton v ISS Catering Services Pty Ltd* [2013] VSCA 361 at [54].

<sup>23</sup> *Eaton v ISS Catering Services Pty Ltd* [2013] VSCA 361 at [55].

<sup>24</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [17].

<sup>25</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [19] referring to *Director of Consumer Affairs Victoria v Scully (No 2)* [2011] VSC 239 at [22]. See also *Eaton v ISS Catering Services Pty Ltd* [2013] VSCA 361 at [49]; *Talacko (as Executor of the Estate of Helena Marie Talacko) v Talacko* [2013] VSC 712 at [79].

<sup>26</sup> *Yara Australia Pty Ltd v Oswal* [2013] VSCA 337 at [24]-[25].

<sup>27</sup> *Civil Procedure Act 2010* (Vic) s 29(2).

However, this does not mean that either the obligations or the court's powers under our *Civil Procedure Act* are aspirational rather than obligatory.

23. As you know, the court has broad powers where a party fails to comply with a direction, including making an order as to costs or making any other order that is appropriate.<sup>28</sup> In interlocutory proceedings, the court can order that costs be paid immediately.<sup>29</sup> Of course, costs can also be ordered against practitioners in certain circumstances, including where they have been incurred improperly or without reasonable cause.<sup>30</sup> These powers are not used infrequently. Significantly, they have been applied in circumstances that are not dissimilar to *Yara*, where the court itself expressed concern about the way in which interlocutory proceedings had been conducted.<sup>31</sup>
24. In addition, there are several recent examples in the Supreme Court which clearly demonstrate that a firm approach continues to be taken in relation to section 56. In my view, they also suggest that the Court has appropriate powers to deal with parties and legal practitioners who fail to conduct proceedings in a way that facilitates their just, quick and cheap resolution.
25. In recent times, the Court of Appeal has repeatedly reaffirmed the position that the regime in Part 6 of the New South Wales *Civil Procedure Act* brings about a new statutory balance among various factors, which includes the efficiency of proceedings and the delivery of individualised justice.<sup>32</sup>
26. However, it is worth referring in particular to a decision from April this year in *Trugal v Tarrant's Financial Consultants*.<sup>33</sup> The judgment – one in a series of interlocutory disputes – arose following the dismissal of an application for

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<sup>28</sup> *Civil Procedure Act 2005* (NSW) s 61. See also Uniform Civil Procedure Rules 2005 (NSW), Pt 2, r 42.10.

<sup>29</sup> Uniform Civil Procedure Rules 2005 (NSW), r 42.7(2).

<sup>30</sup> *Civil Procedure Act 2005* (NSW) s 99. See also *Legal Profession Act 2004* (NSW), s 348.

<sup>31</sup> See eg *Harris v Villacare Pty Ltd* [2012] NSWSC 452.

<sup>32</sup> See eg *Dai v Zhu* [2013] NSWCA 412 at [88] referring to *Hans Pet Constructions Pty Limited v Cassar* [2009] NSWCA 230 at [36] (per Allsop ACJ).

<sup>33</sup> *Ken Tugrul v Tarrant's Financial Consultants Pty Limited (No 5)* [2014] NSWSC 437.



security for costs. Significantly, the application had been filed without prior correspondence with the plaintiffs' lawyers. The successful plaintiffs sought costs of the motion both forthwith and on an indemnity basis. In awarding indemnity costs to four of the five plaintiffs, the judge made several notable comments in relation to the obligations of parties and their representatives.

27. A number of practical guidelines were offered concerning the duties owed by legal practitioners when interlocutory issues arise.<sup>34</sup> While they are each worthy of further consideration, I would emphasise the following. As the judge noted, and contrary to what was said in *Yara*, section 56 and its related provisions 'are not just pious exhortations to be acknowledged and ignored'; they have real consequences and are to be applied rigorously by the court exercising its various powers in relation to costs.<sup>35</sup> Neither the obligations nor the consequences for breaching them are at all illusory.
28. The second general theme is communication. As the judge noted, it would be unfortunate if practitioners did not confer with one another before a strike out motion was filed, or if there was hesitation in speaking with opposing practitioners over the phone for fear of being verbally in an affidavit.<sup>36</sup> In practice, my experience was that many issues – be they affidavit objections or challenges to claims of privilege – could be whittled down by discussions between practitioners. The need for communication cannot be overstated.
29. The third and related point is the significance of cooperation. As the judge reiterated, solicitors and barristers are members of a profession, and it is essential that relationships between practitioners 'are characterised by civility, trust and mutual respect.'<sup>37</sup> Of course warnings like this are not a

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<sup>34</sup> *Ken Tugrul v Tarrant's Financial Consultants Pty Limited (No 5)* [2014] NSWSC 437 at [67]ff.

<sup>35</sup> *Ken Tugrul v Tarrant's Financial Consultants Pty Limited (No 5)* [2014] NSWSC 437 at [69], [77].

<sup>36</sup> *Ken Tugrul v Tarrant's Financial Consultants Pty Limited (No 5)* [2014] NSWSC 437 at [71], [75].

<sup>37</sup> *Ken Tugrul v Tarrant's Financial Consultants Pty Limited (No 5)* [2014] NSWSC 437 at [70].

new thing. Chief Justice Allsop, when a judge of the Federal Court, made a similar point when he explained in *Labocus Precious Metals v Thomas* that

‘There is a balance to be struck between reasonable informality to cut through procedures and resistance to unnecessary demands. That balance is one for practitioners whose fees represent their skill and experience, including their skill in identifying the real issues for trial and bringing them to trial efficiently...’<sup>38</sup>

30. The High Court made a similar point in *Expense Reduction* regarding a proposed rule of conduct which would require that inadvertently disclosed material be returned. The Court firmly stated that ‘such a rule should not be necessary’;<sup>39</sup> the point being that taking steps to immediately return such documents should simply be a matter of course for practitioners. Despite their warning, the rule has since been incorporated into the revised New South Wales professional conduct rules.<sup>40</sup> This seems a perfect example, to draw the discussion back to the point made by Archer in 1910, of the ongoing process of codifying what were previously basic ethical principles.
31. Of course, I know each of you here needs no reminding of the importance of civility and cooperation in the profession. However, it is an issue that I think should be emphasised by the Law Society at every available opportunity. It is the case that courtesy and cooperation do not always fit neatly with the adversarial process. However it is essential, particularly with the challenges that courts face in dealing with an ever growing number of disputes, that the legal profession conduct matters in a way which focuses on the real issues in dispute, to minimise their clients’ own costs as well as the court’s time.

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<sup>38</sup> *Labocus Precious Metals Pty Limited v Thomas (No 3)* [2007] FCA 1346 at [17]. See also *Hawesbury District Health Service Ltd v Chaker* [2010] NSWCA 320 at [2].

<sup>39</sup> *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303 at [66].

<sup>40</sup> New South Wales Professional Conduct and Practice Rules (Solicitors’ Rules) 2013, r 31.

32. It is also an issue that will, I believe, require particular attention as the legal profession continues to grow. It is staggering that the number of practicing solicitors has increased by around 115 percent over the last two decades, and that more than 10 percent of the profession has been admitted for less than a year.<sup>41</sup> The sheer size of the profession today means that personal relationships between practitioners are less likely to encourage (or, I admit, sometimes discourage) civility. This is not to suggest that we should look too fondly on the profession as it used to be. It just means that a stronger emphasis may need to be placed on the need for cooperation in practice.

#### **BALANCING JUST, QUICK AND CHEAP**

33. Having said that, as I mentioned at the outset, alongside the profession's obligations there is also a responsibility on the courts in equal measure. Ensuring matters are conducted in a way so that costs are minimised and that proceedings occur as quickly as possible and in a way that does justice to the issues, is a matter firmly in the hands of both judges and practitioners.
34. This of course has been a long standing principle; it is not simply an approach which came about with the introduction of the *Civil Procedure Act*. There are numerous judicial statements pre-2005 which stress the importance of courts supervising the conduct of cases. It is enough to mention *Sali v SPC*, where Justices Toohey and Gaudron emphasised that
- 'The contemporary approach to court administration has introduced another element into the equation or, more accurately, has put another consideration onto the scales. The view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with the consequent inconvenience to

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<sup>41</sup> Urbis, "2013 Profile of the Solicitors of NSW", Prepared for the Law Society of New South Wales (Final Report, December 2013) at 4, 7.

the court and prejudice to the interests of other litigants waiting to be heard are pressing concerns to which a court may have regard.<sup>42</sup>

That was more than 20 years ago. However, the characterisation of the court's role in case management remains as relevant today as it was then.

35. What needs to be underlined in this context is the importance of balance. The duty of courts to weigh up what are often competing considerations is reflected in the *Civil Procedure Act*. For instance, section 58 states that when deciding whether to make an order and in what terms the order should be, the court must act in accordance with the dictates of justice, which include the overriding purpose. However, the dictates of justice also consist of the objects of case management in section 57: efficient disposal of court business, efficient use of court resources, as well as just determination. On top of that, regard can be had to other factors including the degree of injustice that would be suffered by the parties as a consequence of any order.<sup>43</sup> Much like the purposes which underpin sentencing, it is very much the case that considerations in case management pull in different directions.
36. The importance of courts adopting a flexible approach when dealing with the conduct of proceedings cannot be overemphasised. It is a point which has been made repeatedly; that court rules and efficient case management should not be seen as ends in themselves.<sup>44</sup> As I have said, Part 6 of the *Civil Procedure Act* requires that the various and sometimes competing factors be weighed against one another to determine the dictates of justice.
37. This is often not a straightforward task. In particular, obvious difficulties can arise if procedural rules are used as blunt instruments. With respect, in my

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<sup>42</sup> *Sali v SPC Ltd* (1993) 67 ALJR 841 at 849 (citations omitted) cited with approval in *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 at [93]-[95]. See also *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; (2001) 53 NSWLR 116 at [26].

<sup>43</sup> *Civil Procedure Act 2005* (NSW), s 58(2)(b)(vi).

<sup>44</sup> See eg *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516, 526-27 (Gummow and Hayne JJ), 541-42 (Kirby J).

view, problems of this nature recently arose in England and Wales. I would suggest there are some lessons we can learn regarding the approach courts take to case management from the implementation of reforms in the UK.

38. For any that are unfamiliar, the reforms in England and Wales – colloquially known as the Jackson reforms – came out of an extensive review into the costs of civil litigation conducted by Sir Rupert Jackson.<sup>45</sup> The reforms that were recommended in Sir Rupert’s final report are significant and cover all aspects of civil litigation; among other topics they address general case management, costs management and the introduction of costs budgeting, reforms to disclosure and proposals to further encourage parties to settle.
39. For present purposes, it is sufficient to mention the following two changes. First, the overriding objective in the Civil Procedure Rules was amended to include reference to proportionality; so it now reads, the overriding objective of the rules is to enable the court to ‘deal with cases justly and at proportionate cost’.<sup>46</sup> The rules were also clarified to indicate that dealing with a case justly and proportionately includes ‘enforcing compliance with rules, practice directions and orders’.<sup>47</sup> The more significant change is the amendment to rule 3.9, which addresses circumstances where a party has failed to comply with an order, rule or practice direction. It now simply states that on an application for relief from sanctions which have been imposed as a result of non-compliance, the court is to consider all the circumstances, including the need for litigation to be conducted efficiently and at proportionate cost, and that rules and court orders are complied with.
40. These changes may not seem particularly significant. However, they need to be considered in the context of a decision of the Court of Appeal from late

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<sup>45</sup> Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009).

<sup>46</sup> Civil Procedure Rules 1998 (UK), r 1.1.

<sup>47</sup> Civil Procedure Rules 1998 (UK), r 1.1(2)(f).

last year in *Mitchell v News Group Newspapers*.<sup>48</sup> Briefly, the decision concerned an incident known as ‘plebgate’, which involved Andrew Mitchell, the former Conservative Party Chief Whip. *The Sun* reported that Mitchell had raged at police officers stationed outside Downing Street when he was attempting to leave with his bicycle. According to *The Sun*, he called them plebs, among other four letter words. Mitchell brought a defamation action.

41. At the time, Mitchell’s claim was governed by a pilot scheme which required parties to file a costs budget by a certain time. Mitchell’s budget was filed late, and the Master ordered he be treated as having filed a budget which only included court fees. The Master refused to grant relief from sanctions.
42. Mitchell’s appeal was dismissed. In its judgment, the Court of Appeal indicated the focus should be on whether the breach could be regarded as trivial, and if not, why the default occurred.<sup>49</sup> In relation to Mitchell’s appeal, it warned that overlooking a deadline because of overwork is unlikely to be a good reason.<sup>50</sup> The judgment concluded with a strongly worded caution:

‘...we hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders. If this happens, then we would expect that satellite litigation of this kind, which is so expensive and damaging...will become a thing of the past.’<sup>51</sup>

43. Needless to say, *Mitchell* had a significant effect on the legal profession. It required parties to strictly meet deadlines and to promptly apply for relief where they failed to do so. In one sense, the decision was not particularly revolutionary; courts for many years had been emphasising the need for

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<sup>48</sup> *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795.

<sup>49</sup> *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795 at [40]-[41].

<sup>50</sup> *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795 at [41].

<sup>51</sup> *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; 1 WLR 795 at [60].

firm case management and the importance of rule compliance.<sup>52</sup> However, in another respect, the decision was seen as a significant shift. This is demonstrated by the fact that the term ‘to Mitchell’ someone, which was a reference to a defaulting party, apparently entered the legal vernacular.<sup>53</sup>

44. It is, I think, uncontroversial to say that the decision caused some immediate difficulties. For instance, parties were applying for relief in circumstances where materials had been exchanged less than an hour late. In that case the application for relief was opposed. It required the court to devote time that may have been better spent on other matters to prepare a 41-paragraph judgment which found that the delay was trivial.<sup>54</sup> It led to other instances in which judges strongly criticised parties for attempting to rely on *Mitchell* to gain an advantage<sup>55</sup> and, worryingly, observing that the Jackson reforms seemed to have promoted satellite litigation, rather than avoid it.<sup>56</sup>
45. These difficulties could, of course, simply be seen as a few rocky bumps in the process of achieving significant and lasting reform to modern litigation practices. Indeed, as the Court of Appeal recognised in *Mitchell*, ‘changes in litigation culture will not occur overnight’, but as a result of publicity given to the judgment, ‘the necessary changes will take place before too long.’<sup>57</sup>
46. Despite this, less than 8 months later, the Court of Appeal had cause to reconsider *Mitchell* in three appeals heard together regarding the operation of rule 3.9.<sup>58</sup> In fact, in light of the broader criticism that had been levelled

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<sup>52</sup> See for instance the references in J Williams, “‘Well, that’s a relief (from sanctions!)’ – Time to pause and take stock of CPR r 3.9 developments within a general theory of case management” (2014) 33(4) *Civil Justice Quarterly* 394, 402-03.

<sup>53</sup> A Higgins, “CPR 3.9: the Mitchell guidance, the Denton revision, and why coded messages don’t make for good case management” (2014) 33(4) *Civil Justice Quarterly* 379, 387. See also the reference in *Wain v Gloucestershire CC* [2014] EWHC 1274 (TCC); [2014] 4 Costs L.O. 585 at [12].

<sup>54</sup> *Lakatamia Shipping Company Ltd v Nobu Su Ltd* [2014] EWHC 275 (Comm); [2014] 2 Costs L.R. 307.

<sup>55</sup> *Summit Navigation Ltd v Generali Romania Asigurare Reasigurare SA* [2014] EWHC 398 (Comm); [2014] 1 WLR 3472 at [1].

<sup>56</sup> *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506; [2014] 3 Costs L.R. 588 at [61]. In his judgment, Davis LJ stated that he hoped this unfortunate by-product of r 3.9 would be temporary.

<sup>57</sup> *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; 1 WLR 795 at [46].

<sup>58</sup> *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] CP Rep 40.

at *Mitchell*, the Court in *Denton v TH White* went so far as to invite the Bar Association and the Law Society to intervene.<sup>59</sup> While the Court held the guidance given in *Mitchell* was ‘substantially sound’, it also considered that it had been ‘misunderstood’ and was being ‘misapplied by some courts.’<sup>60</sup>

47. Despite *Mitchell* being ‘substantially sound’, the Court went on to identify a new three stage test to be used when dealing with applications for relief from sanctions.<sup>61</sup> It is unnecessary for present purposes to go into any detail about the new test in *Denton*. It is enough to say that the first step concerns whether the breach was serious or significant; the second is to consider why it occurred; and the third is to address all the circumstances of the case. However, it is important to note that while the Master of the Rolls and Lord Vos wrote together in formulating the test, Lord Jackson – the very author of the Jackson review – dissented in relation to the third stage of the inquiry.<sup>62</sup> The majority considered that the two factors listed in rule 3.9 should be given particular weight when considering all of the circumstances. On the other hand, Lord Jackson determined that those two factors – that litigation should be conducted efficiently and proportionately, and the need to enforce rule compliance – should be given no extra weight.
48. In some ways, regardless of the actual test in *Denton*, the differing approaches taken are a less than ideal result. It may be the final word in relation to relief from sanctions under the Jackson reforms is yet to come. In the end, it is perhaps not the precise nature of the test that is important; although clear and practical guidance for legal practitioners should be a significant goal of the courts, especially in areas such as case management. Together, what *Mitchell*, many of the applications of *Mitchell*, and *Denton* illustrate, is that achieving balance in this area is not a straightforward task.

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<sup>59</sup> *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] CP Rep 40 at [3].

<sup>60</sup> *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] CP Rep 40 at [3], [24].

<sup>61</sup> *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] CP Rep 40 at [24]-[38].

<sup>62</sup> *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] CP Rep 40 at [85].



49. It is no longer in dispute that there is a need for robust case management. It has been recognised on many occasions that a renewed approach is required to address the cost of litigation and delays in the justice system; without question, the way in which the system functions regarding a specific dispute has consequences both for the court itself and for other litigants.<sup>63</sup> However, as Justice Kirby observed in *Jackamarra v Krakouer*, movement between two poles – strict adherence to practice at one end and ensuring that rules don't become 'an instrument of tyranny' at the other – is a cyclical process.<sup>64</sup> Finding the correct balance on that spectrum is the challenge.
50. I would caution against setting the balance too greatly in favour of efficiency and economy above the need to achieve justice between the parties on the merits. It was the case that for a lengthy period in England, up to at least the end of the 19<sup>th</sup> century, proceedings were often dealt with on procedural questions rather than on their substance.<sup>65</sup> As W B Odgers described it a century later, courts in the year 1800 were sadly hampered by 'cumbrous procedure and pedantic technicalities' so that 'half the actions were decided not on their real merits, but on questions of form and pleading.'<sup>66</sup> It would be unfortunate if we arrived at a position today regarding case management which bore any similarity to the approach to procedure during that period.
51. As Part 6 of the *Civil Procedure Act* makes clear, the dictates of justice and the overriding purpose reflect the need for substantive, proportionate and timely justice. As I think has consistently been the approach of Australian courts, there is a need for those primary purposes to be carefully balanced.

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<sup>63</sup> See *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 250 CLR 303 at [51].

<sup>64</sup> *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516, 526-27 541-42.

<sup>65</sup> For a history of the early approach to procedure and particularly the issue of pleadings, see A Zuckerman, *Zuckerman on Civil Procedure* (3ed ed, Sweet & Maxwell 2013) at [1.65]-[1.69]; The Hon. Justice Blair et al (eds), *Bullen & Leake & Jacob's Precedents of Pleadings* (17<sup>th</sup> ed, Sweet & Maxwell, 2012, [1-05]-[1-05].

<sup>66</sup> W B Odgers, "Changes in procedure and in the law of evidence" in *A century of law reform: twelve lectures on the changes in the law of England during the nineteenth century* (Macmillan & Co, 1901) at 212.

Seeking to reduce litigation costs and to ensure that matters are determined promptly should not be realised by unduly disregarding the merits of a claim.

52. I am not suggesting that this is in fact what occurred in England and Wales following the Jackson reforms and *Mitchell*. However, there has certainly been a shift toward a need for greater rule compliance. As the majority in *Denton* concluded in relation to the three appeals:

'It seems that some judges have ignored the fact that it is necessary in every case to consider all the circumstances of the case... But other judges have adopted what might be said to be the traditional approach of giving pre-eminence to the need to decide the claim on the merits. That approach should have disappeared following the *Woolf* reforms. There is certainly no room for it in the post-*Jackson* era.'<sup>67</sup>

That may be so. However, courts should remain mindful of the fact that the principal function of case management is to efficiently guide proceedings to a substantive hearing on the merits.

53. To draw the discussion back to the duties of the profession, the majority in *Denton* dealt squarely with the growth of satellite litigation and a lack of cooperation between practitioners following *Mitchell*. They rightly noted that efficient and proportionate litigation requires compliance with rules, as well as cooperation between parties and their lawyers.<sup>68</sup> They also issued several warnings: opportunism by parties and practitioners to minor mistakes made by opposing parties will not be tolerated;<sup>69</sup> but equally, courts should make directions which are both 'realistic and achievable'.<sup>70</sup>

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<sup>67</sup> *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] CP Rep 40 at [81].

<sup>68</sup> *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] CP Rep 40 at [40].

<sup>69</sup> *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] CP Rep 40 at [39]-[43].

<sup>70</sup> *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] CP Rep 40 at [44].

54. I couldn't agree more. Those statements neatly fit my theme today of the related obligations borne by the profession and the judiciary regarding case management. It is the case that parties will need to be increasingly mindful of the way in which interlocutory issues are dealt with. Partly, that is making sure parties and practitioners cooperate and are civil to one another. This is an aspect of the adversarial process guided by the overarching duty to assist the court to achieve the just, quick and cheap resolution of matters.
55. This requires practitioners to communicate with their opposing colleagues. It will often be the case that matters can be resolved by discussing an issue, seeking further clarification or offering a proposal as to how a problem could be more efficiently dealt with. It will rarely, if ever, be the case that a motion should be filed without first discussing its contents with other practitioners in the matter. Such an approach will usually save time and considerable cost.
56. One thing that does emerge from the United Kingdom cases is there is a danger that requiring rigid compliance with rules can cost more than it's worth. I don't suggest that parties should ignore rules or directions if they think that it's more economically efficient to do so. However, it should always be borne in mind that the rules are there to assist in the resolution of proceedings and can be dispensed with in appropriate cases. Whether or not it involves an ethical obligation, attending to litigation professionally now involves considering the most expeditious way to process it, as well as the need for cooperation and communication between the parties and practitioners to achieve the objectives enshrined in section 56.
57. There is, however, a responsibility on the judiciary in equal measure. In seeking to facilitate the just, quick and cheap resolution of proceedings, courts should not lose sight of the first component of the overriding purpose. In England and Wales, *Mitchell* and *Denton* reflect a move toward more stringent case management, perhaps with some initial bumps and wobbles.

It may be the Jackson reforms bring about a greater culture of compliance. If that is the result, they are changes which we could certainly learn from.

58. However, in the meantime, I believe that courts in this State are generally adopting a thorough and reasoned approach to case management. *Yara* may well be seen as a significant shift in Victoria regarding compliance. However, as I have said, in my view the duties here are the same, and the court is appropriately empowered to deal with instances where parties and practitioners fall short of their obligations. We need to ensure we use them.

### **CONCLUSION**

59. I hope what I have said has been of some interest to you. Unfortunately, I have not had time to discuss the ethical issues associated with taking notes into a closed book ethics exam and attempting to dispose of them down one's trousers when they are discovered. Like most cases which address professional ethics, I think the questions involved are fairly straightforward.
60. The issues of rule compliance and cooperation in the profession are far more complex. As I have said, I believe the Law Society will continue to play an important role in making sure that practitioners fulfill their ethical obligations and do so in a way that upholds the standing of the profession.
61. Can I thank each of you for all your work over the past 12 months, and wish you the very best for the year ahead. On that note, I'm more than happy to take questions that you have on any issue, be it ethics-based or otherwise.